

**Before the  
Federal Communications Commission  
Washington, DC 20554**

|                                 |   |                              |
|---------------------------------|---|------------------------------|
| In the Matter of                | ) |                              |
|                                 | ) |                              |
| <b>CUMULUS LICENSING CORP.,</b> | ) | File No. EB-03-IH-0257       |
|                                 | ) | NAL Account No. 200432080015 |
| Licensee of Station WSEA-FM,    | ) | Facility ID No. 3221         |
| Atlantic Beach, South Carolina  | ) | FRN No. 0005260377           |
|                                 | ) |                              |
|                                 | ) |                              |

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: February 17, 2004**

**Released: February 19, 2004**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that, on March 7, 2003, Cumulus Licensing Corp. ("Cumulus"), licensee of Station WSEA(FM), Atlantic Beach, South Carolina, apparently violated section 73.1206 of the Commission's rules, which relates to the broadcast of telephone conversations.<sup>1</sup> Based upon our review of the facts and circumstances in this case, and for the reasons discussed below, we conclude that Cumulus is apparently liable for a monetary forfeiture in the amount of Four Thousand Dollars (\$4,000.00).

**II. BACKGROUND**

2. We received a complaint that, on March 7, 2003, Cumulus broadcast a telephone conversation between Dan Hockert, a Cumulus radio personality, and Anne Crutchman, a receptionist for a radio station that is a WSEA(FM) competitor, without Ms. Crutchman's knowledge.<sup>2</sup> Mr. Hockert apparently called the competing radio station, and Ms. Crutchman answered the telephone and identified the competing station. Without identifying himself and without informing Ms. Crutchman that the telephone call was going to be broadcast, Mr. Hockert asked Ms. Crutchman if his friend "Emily" was in the lobby. Ms. Crutchman confirmed that a person identifying herself as Emily was there. Mr. Hockert asked if he could speak with Emily and Ms. Crutchman said that he could and asked him to hold. Mr. Hockert then asked Emily several times to state from whom she had won concert tickets, asking her to loudly identify Cumulus' station several times in the lobby of its competitor. Ms. Crutchman immediately related the incident to the program director of the competing radio station. The program director made a cassette copy of the telephone conversation as it was being broadcast.<sup>3</sup> Ms. Crutchman

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<sup>1</sup> 47 C.F.R. § 73.1206.

<sup>2</sup> See Letter from Anne Crutchman to the Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated March 28, 2003 ("Letter Complaint").

<sup>3</sup> *Id.* at 1.

enclosed the cassette with her complaint.

3. On October 27, 2003, the Commission sent a letter of inquiry (“LOI”) to Cumulus, enclosing as Attachment A to the LOI a transcript of the cassette copy of the telephone conversation broadcast by Cumulus.<sup>4</sup> The Commission asked Cumulus whether one of its stations broadcast the telephone conversation transcribed in Attachment A to the LOI, and if so, whether Cumulus informed all parties to the conversation that it was going to be broadcast. The Commission asked Cumulus to verify the accuracy of the transcript of the broadcast, and to provide their own audio recordings, transcripts or other documentation of the broadcast of the telephone conversation. In its response to the LOI, Cumulus states that it broadcast a telephone conversation that was “similar if not identical” to the one transcribed in Attachment A to the LOI.<sup>5</sup> Cumulus also states that Ms. Crutchman was not informed that her telephone conversation with Mr. Hockert would be broadcast.<sup>6</sup> Cumulus states that WSEA(FM) has a copy of relevant Commission rules, and Cumulus now requires that its Myrtle Beach on-air employees state in writing that they understand and will abide by section 73.1206 of the Commission’s rules.<sup>7</sup>

### III. DISCUSSION

4. Under section 503(b)(1) of the Act,<sup>8</sup> any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty. In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.<sup>9</sup> The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the

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<sup>4</sup> Letter from Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to Cumulus Media, Inc., dated October 27, 2003 (“LOI”).

<sup>5</sup> Letter from Richard S. Denning, General Counsel, Cumulus Licensing Corp. to David Janas, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated November 26, 2003, at 2 (“Cumulus Response to Inquiry”).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 3.

<sup>8</sup> 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); *see also* 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See, e.g., Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (“*Southern California Broadcasting Co.*”). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator’s repeated signal leakage). “Repeated” merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

<sup>9</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

Act or a Commission rule.<sup>10</sup> As we set forth in greater detail below, we conclude under this standard that Cumulus is apparently liable for a forfeiture for its apparent willful violation of section 73.1206 of the Commission's rules.

5. Section 73.1206 of the Commission's rules provides, in pertinent part:

Before recording a telephone conversation for broadcast . . . a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Such awareness is presumed to exist only when the other party to the call is associated with the station (such as [sic] employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.

Thus, section 73.1206 requires licensees to so notify parties to a telephone call *before* it initiates recordings for simultaneous or later broadcasts. The Commission has stated that "[t]he recording of such conversation with the intention of informing the other party later -- whether during the conversation or after it is completed but before it is broadcast -- does not comply with the Rule . . . ."<sup>11</sup> The rule reflects the Commission's longstanding belief that prior notification is essential to protect individuals' legitimate expectation of privacy, as well as to preserve their dignity by avoidance of nonconsensual broadcasts of their conversations.<sup>12</sup> Thus, the Commission has held that the prior notification requirement ensures the protection of an individual's "right to answer the telephone without having [his or her] voice or statements transmitted to the public by a broadcast station" live or by recording for delayed airing.<sup>13</sup> Applying this reasoning, the Commission has defined "conversations" broadly "to include *any* word or words spoken during the telephone call," and specifically has rejected arguments that "utterances made by parties called in answering the phone" are not subject to the rule's prior notification requirement.<sup>14</sup>

6. Based upon the information before us, it appears that, on March 7, 2003, Cumulus broadcast a telephone conversation between Mr. Hockert and Ms. Crutchman, without informing Ms. Crutchman that Cumulus intended to broadcast the conversation, in apparent willful violation of section 73.1206 of the Commission's rules. In light of this apparent violation, we believe it appropriate that Cumulus be assessed a monetary forfeiture. The Commission's forfeiture guidelines establish a base

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<sup>10</sup> See, e.g., *SBC Communications, Inc.*, Apparent Liability for Forfeiture, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

<sup>11</sup> *Station-Initiated Telephone Calls which Fail to Comply with Section 73.1206 of the Rules*, Public Notice, 35 FCC 2d 940, 941 (1972) ("1972 Public Notice").

<sup>12</sup> See *Amendment of Section 1206: Broadcast of Telephone Conversations*, 3 FCC Rcd 5461, 5463-64 (1988) ("1988 Order"); 1972 Public Notice, 35 FCC 2d at 941; *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to the Broadcast of Telephone Conversations*, 23 FCC 2d 1, 2 (1970); see also *EZ Sacramento, Inc. and Infinity Broadcasting Corp. of Washington, D.C.*, 16 FCC Rcd 4958, 4958 (2002) (finding that prior notifications "effectively cease" when callers are put on hold, and that thus explicit notice must be given if stations plan to continue such broadcasts or record such conversations for later broadcasts); *Hefel Broadcasting-Contemporary, Inc.*, 52 FCC 2d 1005, 1006 (1975) (finding that "cash call" promotions that simultaneously broadcast, and award prizes based on, parties' responses in answering the telephone are subject to section 73.1206's prior notification requirement).

<sup>13</sup> 1988 Order, 3 FCC Rcd at 5463.

<sup>14</sup> *Hefel Broadcasting-Contemporary, Inc.*, 52 FCC 2d at 1006 (emphasis added).

forfeiture amount of \$4,000.00 for the unauthorized broadcast of a telephone conversation<sup>15</sup> and provide that base forfeitures may be adjusted based upon consideration of the factors enumerated in Section 503(b)(2)(D) of the Communications Act of 1934, as amended (the "Act"),<sup>16</sup> and section 1.80(a)(4) of the Commission's rules,<sup>17</sup> which include "the nature, circumstances, extent, and gravity of the violation . . . and the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."<sup>18</sup> Although we commend Cumulus' efforts to remind its Myrtle Beach on-air employees of the obligations of section 73.1206, Cumulus' subsequent remedial efforts do not alter the fact that the violation took place or justify further mitigation or cancellation of the proposed forfeiture penalty. Based upon these facts and considering all of the circumstances present here, we find \$ 4,000 to be the appropriate proposed forfeiture amount.

#### IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended,<sup>19</sup> and sections 0.111, 0.311 and 1.80 of the Commission's rules,<sup>20</sup> Cumulus Licensing Corp., licensee of Station WSEA(FM), Atlantic Beach, South Carolina, is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of four thousand dollars (\$4,000.00) for apparently willfully violating section 73.1206 of the Commission's rules on March 7, 2003.<sup>21</sup>

8. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the rules,<sup>22</sup> within thirty (30) days of this NOTICE OF APPARENT LIABILITY, Cumulus Licensing Corp., SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment must include the FCC Registration Number (FRN) referenced above and also must note the NAL/Acct. No. referenced above.

9. The response, if any, must be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B443, Washington, D.C. 20554 and MUST INCLUDE THE NAL/Acct. No. referenced above.

10. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.<sup>23</sup>

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<sup>15</sup> 47 C.F.R. §1.80(b)(4) note. *See also Commission's Forfeiture Policy Statement and Amendment of section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("Forfeiture Policy Statement").

<sup>16</sup> 47 U.S.C. §503(b)(2)(D).

<sup>17</sup> 47 C.F.R. §1.80(a)(4).

<sup>18</sup> 47 C.F.R. §1.80(b)(4) note. *See also Forfeiture Policy Statement* at 17100-01.

<sup>19</sup> 47 U.S.C. § 503(b).

<sup>20</sup> 47 C.F.R. §§ 0.111, 0.311 and 1.80.

<sup>21</sup> 47 C.F.R. § 73.1206.

<sup>22</sup> 47 C.F.R. § 1.80.

<sup>23</sup> 47 C.F.R. § 1.1914.

11. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If you qualify as a small entity and if you wish to be treated as a small entity for tracking purposes, please so certify to us within thirty (30) days of this NAL, either in your response to the NAL or in a separate filing to be sent to the Investigations and Hearings Division. Your certification should indicate whether you, including your parent entity and its subsidiaries, meet one of the definitions set forth in the list provided by the FCC's Office of Communications Business Opportunities (OCBO) set forth in Attachment A of this Notice of Apparent Liability. This information will be used for tracking purposes only. Your response or failure to respond to this question will have no effect on your rights and responsibilities pursuant to Section 503(b) of the Communications Act. If you have questions regarding any of the information contained in Attachment A, please contact OCBO at (202) 418-0990.

12. IT IS FURTHER ORDERED THAT a copy of this NOTICE OF APPARENT LIABILITY shall be sent by Certified Mail - Return Receipt Requested to Richard S. Denning, General Counsel, Cumulus Licensing Corp., Building 14, 3535 Piedmont Road, Atlanta, Georgia 30305; and Lewis J. Paper, Esquire, Dickstein Shapiro Morin & Oshinsky LLP, 2101 L Street NW, Washington, D.C. 20037-1526.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau

## Attachment A

### FCC List of Small Entities

As described below, a “small entity” may be a small organization, a small governmental jurisdiction, or a small business.

| (1) Small Organization   |  |
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| Any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.   |  |
| (2) Small Governmental Jurisdiction  |  |
| Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.            |  |
| (3) Small Business   |  |
| Any business concern that is independently owned and operated and is not dominant in its field, <i>and</i> meets the pertinent size criterion described below. |  |
| Industry Type  | Description of Small Business Size Standards   |
| <i>Cable Services or Systems</i>   |  |
| Cable Systems  | Special Size Standard –<br>Small Cable Company has 400,000 Subscribers Nationwide or Fewer |
| Cable and Other Program Distribution   | \$12.5 Million in Annual Receipts or Less  |
| Open Video Systems   |  |
| <i>Common Carrier Services and Related Entities</i>  |  |
| Wireline Carriers and Service providers  | 1,500 Employees or Fewer   |
| Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers                   |  |

**Note:** With the exception of Cable Systems, all size standards are expressed in either millions of dollars or number of employees and are generally the average annual receipts or the average employment of a firm. Directions for calculating average annual receipts and average employment of a firm can be found in 13 CFR 121.104 and 13 CFR 121.106, respectively.

| International Services   |   |
|--|---|
| International Broadcast Stations   | \$12.5 Million in Annual Receipts or Less   |
| International Public Fixed Radio (Public and Control Stations)             |   |
| Fixed Satellite Transmit/Receive Earth Stations                            |   |
| Fixed Satellite Very Small Aperture Terminal Systems                       |   |
| Mobile Satellite Earth Stations  |   |
| Radio Determination Satellite Earth Stations                               |   |
| Geostationary Space Stations   |   |
| Non-Geostationary Space Stations   |   |
| Direct Broadcast Satellites  |   |
| Home Satellite Dish Service  |   |
| Mass Media Services  |   |
| Television Services  | \$12 Million in Annual Receipts or Less   |
| Low Power Television Services and Television Translator Stations           |   |
| TV Auxiliary, Special Broadcast and Other Program Distribution Services    |   |
| Radio Services   | \$6 Million in Annual Receipts or Less  |
| Radio Auxiliary, Special Broadcast and Other Program Distribution Services |   |
| Multipoint Distribution Service  | Auction Special Size Standard –<br><b>Small Business</b> is less than \$40M in annual gross revenues for three preceding years  |
| Wireless and Commercial Mobile Services                                    |   |
| Cellular Licensees   | 1,500 Employees or Fewer  |
| 220 MHz Radio Service – Phase I Licensees                                  |   |
| 220 MHz Radio Service – Phase II Licensees                                 | Auction special size standard -<br><b>Small Business</b> is average gross revenues of \$15M or less for the preceding three years (includes affiliates and controlling principals)<br><b>Very Small Business</b> is average gross revenues of \$3M or less for the preceding three years (includes affiliates and controlling principals)                 |
| 700 MHz Guard Band Licensees   |   |
| Private and Common Carrier Paging  | 1,500 Employees or Fewer  |
| Broadband Personal Communications Services (Blocks A, B, D, and E)         |   |
| Broadband Personal Communications Services (Block C)                       | Auction special size standard -<br><b>Small Business</b> is \$40M or less in annual gross revenues for three previous calendar years<br><b>Very Small Business</b> is average gross revenues of \$15M or less for the preceding three calendar years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) |
| Broadband Personal Communications Services (Block F)                       |   |
| Narrowband Personal Communications Services                                |   |
| Rural Radiotelephone Service   | 1,500 Employees or Fewer  |
| Air-Ground Radiotelephone Service  |   |
| 800 MHz Specialized Mobile Radio   | Auction special size standard -<br><b>Small Business</b> is \$15M or less average annual gross revenues for three preceding calendar years  |
| 900 MHz Specialized Mobile Radio   |   |

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|---|--|
| Private Land Mobile Radio   | 1,500 Employees or Fewer   |
| Amateur Radio Service   | N/A  |
| Aviation and Marine Radio Service   | 1,500 Employees or Fewer   |
| Fixed Microwave Services  |  |
| Public Safety Radio Services  | <b>Small Business</b> is 1,500 employees or less<br><b>Small Government Entities</b> has population of less than 50,000 persons  |
| Wireless Telephony and Paging and Messaging   | 1,500 Employees or Fewer   |
| Personal Radio Services   | N/A  |
| Offshore Radiotelephone Service   | 1,500 Employees or Fewer   |
| Wireless Communications Services  | <b>Small Business</b> is \$40M or less average annual gross revenues for three preceding years<br><b>Very Small Business</b> is average gross revenues of \$15M or less for the preceding three years  |
| 39 GHz Service  |  |
| Multipoint Distribution Service   | Auction special size standard (1996) –<br><b>Small Business</b> is \$40M or less average annual gross revenues for three preceding calendar years<br>Prior to Auction –<br><b>Small Business</b> has annual revenue of \$12.5M or less   |
| Multichannel Multipoint Distribution Service  | \$12.5 Million in Annual Receipts or Less  |
| Instructional Television Fixed Service  |  |
| Local Multipoint Distribution Service   | Auction special size standard (1998) –<br><b>Small Business</b> is \$40M or less average annual gross revenues for three preceding years<br><b>Very Small Business</b> is average gross revenues of \$15M or less for the preceding three years  |
| 218-219 MHZ Service   | First Auction special size standard (1994) –<br><b>Small Business</b> is an entity that, together with its affiliates, has no more than a \$6M net worth and, after federal income taxes (excluding carryover losses) has no more than \$2M in annual profits each year for the previous two years<br>New Standard –<br><b>Small Business</b> is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)<br><b>Very Small Business</b> is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) |
| Satellite Master Antenna Television Systems   | \$12.5 Million in Annual Receipts or Less  |
| 24 GHz – Incumbent Licensees  | 1,500 Employees or Fewer   |
| 24 GHz – Future Licensees   | <b>Small Business</b> is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)<br><b>Very Small Business</b> is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)   |
| <b>Miscellaneous</b>  |  |
| On-Line Information Services  | \$18 Million in Annual Receipts or Less  |
| Radio and Television Broadcasting and Wireless Communications Equipment Manufacturers | 750 Employees or Fewer   |



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| Audio and Video Equipment Manufacturers                |   |
| Telephone Apparatus Manufacturers<br>(Except Cellular) | 1,000 Employees or Fewer                  |
| Medical Implant Device Manufacturers                   | 500 Employees or Fewer                    |
| Hospitals  | \$29 Million in Annual Receipts or Less   |
| Nursing Homes  | \$11.5 Million in Annual Receipts or Less |
| Hotels and Motels                                      | \$6 Million in Annual Receipts or Less    |
| Tower Owners   | (See Lessee's Type of Business)           |